

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

KAYCEE GROVEN,

Charging Party,
-v-

HAVRE EAGLES CLUB NO. 166,

Respondent/Appellant,

Case # 0101014036

ORDER

Charging Party, Kaycee Groven, filed a complaint with the Department of Labor and Industry (Department), which alleged discrimination in employment on the basis of gender (sexual harassment), which created a hostile work environment at Havre Eagles Club, No. 166. Following an informal investigation, the Department determined that a preponderance of the evidence supported Groven's allegations. The case went before the Hearings Bureau of the Department of Labor and Industry, which held a contested case hearing, pursuant to § 49-2-505, MCA. The hearings officer issued a Decision on April 8, 2011.

The hearings officer determined that Havre Eagles Club discriminated against Groven on the basis of gender, in violation of the Montana Human Rights Act. The sexual harassment perpetrated by the Club's general manager Thomas Farnham resulted in a hostile and abusive work environment. The hearing officer further concluded that the Havre Eagles Club had constructively discharged Groven from her employment because working conditions had become both subjectively and objectively intolerable.

The hearings officer proposed that Havre Eagles Club compensate Groven in the amount of \$193,502.47, which represented \$44,069 in lost wages and benefits to the

date of the decision; \$5,118.20 in prejudgment interest; \$69,246 in lost future earnings; and \$75,000 in emotional distress damages. The hearing officer further proposed that Havre Eagles Club take specific action to ensure that no further discrimination on the basis of sex occur by adopting policies that prohibit sexual harassment in the workplace; providing a minimum of four hours of employment discrimination training for all employees and the members of the Board of Trustees; and, for as long as Thomas Farnham remains employed by the Havre Eagles Club, ensuring that Farnham's behavior with female staff is closely monitored and that Farnham is never allowed to be alone with a female employee.

Havre Eagles Club, No. 166, filed an appeal with the Montana Human Rights Commission (Commission). The Commission considered the matter on July 20, 2011. Lindsay A. Lorang, attorney, appeared and argued on behalf of the Havre Eagles Club, No. 166. Ms. Lorang did not dispute the liability of Havre Eagles Club for the sexual harassment and hostile work environment that Groven experienced, but argued that the hearing officer's award for compensatory damages was excessive. Donald Ford Jones, attorney, appeared and argued on behalf of Kaycee Groven. Mr. Jones argued that the hearing officer based the award of compensatory damages upon competent substantial evidence.

STANDARD OF REVIEW

The Commission may reject or modify the conclusions of law and interpretations of the administrative rules in the hearing officer's decision but it may not reject or modify the findings of fact unless the Commission first reviews the complete record and states with particularity in the order the findings that were not based upon competent substantial evidence or that the proceedings on which the findings were based did not

comply with the essential requirements of law. *Admin. R. Mont. 24.9.123(4)*. A finding of fact is clearly erroneous if it is not supported by substantial evidence in the record, if the fact finder misapprehended the effect of the evidence, or if a review of the record leaves the court with a definite and firm conviction that a mistake has been made.

Denke v. Shoemaker, 2008 MT 418, ¶ 39, 347 Mont. 322, ¶ 39, 198 P.3d 284, ¶ 39.

The Commission's standard of review for conclusions of law is whether the hearing officer's interpretation and application of the law is correct. *Denke*, ¶ 39.

When the hearing officer finds a party against whom a complaint was filed engaged in the discriminatory practice alleged in the complaint, the Department of Labor and Industry shall order the party to refrain from engaging in the discriminatory conduct and may require any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to the person discriminated against. *Mont. Code Ann. § 49-2-506(1)(b)*.

ORDER

After careful consideration of the complete record and the argument presented by the parties, the Commission determines that the hearing officer's findings of fact wholly support the conclusion that Groven was subjected to sexually hostile work environment during the years she worked Havre Eagles Club No. 166. The hearing officer made extensive findings regarding the harm Groven experienced due to the extreme emotional distress that resulted from Farnham's relentless pattern of harassment. However, the Commission is left with a definite and firm conviction that the hearing officer made a mistake in his determination that \$75,000 is sufficient to compensate Groven for the extreme emotional distress that she experienced over the years of her employment with Havre Eagles Club No. 166. Consequently, the

Commission takes exception to that portion of Finding of Fact (FOF) No. 48, but affirms by this Order all other findings of fact and conclusions of law made by the hearing officer in this matter.

Thomas Farnham was the general manager of the Havre Eagles Club and reported directly to the Board of Trustees. *FOF No. 1*. During the entire period of Groven's employment as a barmaid, bartender and assistant manager, Farnham was her direct supervisor. *FOF Nos. 1-2*. Over a multiple-year period, Farnham's unwelcome sexual advances toward Groven increased in both frequency and intensity, culminating in Farnham's criminal conviction for sexual assault. *FOF Nos. 4-23, 29; Opinion p. 14-15*. Groven never encouraged Farnham's attentions and never engaged in a consensual sexual relationship with him. *FOF No. 23*.

Groven repeatedly informed members of the Board of Trustees about the unconstrained harassment, but no action was taken to limit the sexual abuse or address Farnham's inappropriate conduct. *FOF Nos. 30-36*. One member of the Board testified that the Trustees may have done nothing to curb Farnham's behavior because they each considered Farnham as a friend. *FOF No. 34*. In fact, a few members of the Board of Trustees visited Farnham while he was serving 30 days in jail for sexually assaulting Groven. *FOF No. 29*. Only after Groven left her job at the Eagles Club, did the Trustees issue Farnham a disciplinary warning regarding the "misconduct between bartender and manager." *FOF No. 27*. And, only after the national Eagles organization stepped in did the Trustees fire Farnham. *FOF No. 27*. Two months later, the Havre Eagles Club rehired Farnham, and he remains employed as the general manager. *FOF Nos. 27-28*.

Groven loved her job and was very good at it. *FOF No. 24*. Although Groven had not called in sick for five years, when Farnham's sexual harassment escalated,

Groven came to hate going to work. *FOF No. 24*. She became extremely anxious at the thought of being alone with Farnham and asked co-workers to accompany her when she opened and closed the Club. *FOF No. 24*. Groven started to wear baggy clothes, stopped fixing her hair, became distracted and cried frequently. *FOF Nos. 24, 44*. Her sleep patterns were disturbed and she became depressed. *FOF Nos. 24, 44-46*.

Farnham's behavior rendered Groven's job so intolerable than any objective person in Groven's position would have also found that quitting was the only reasonable alternative. *FOF Nos. 25 and 26; Opinion p. 16*.

The hearing officer found that Groven had been diligent in seeking new employment, even though the emotional distress she suffered from the harassment and the loss of her job at the Eagles Club made re-entry into the workforce more difficult. *FOF Nos. 40, 43*. The day after Groven left her job, a man came to her home and told her that everyone at the Eagles Club was saying that she had been sleeping with Farnham. *FOF No. 48*. For two weeks after Groven left the Eagles Club she did not leave her house. *FOF No. 45*. Groven heard people in the community say that she had accused Farnham of harassment because she wanted his job and that she had a history of making false accusations. *FOF No. 48*. Groven lost many long term friendships and has refrained from engaging in social activities for fear of seeing Farnham or his friends in public. *FOF No. 48*.

The hearing officer found that Groven had been completely humiliated. *FOF Nos. 44, 48*. Even though Groven has lived in Havre her entire life, she no longer wishes to remain there. *FOF No. 43*.

The hearing officer reiterated the symptoms of extreme stress that Groven experienced, which include loss of sleep, anxiety, nervousness, being easily startled, memory difficulties, digestive problems, weight loss, frequent headaches, irritability and

depression. *FOF No. 45*. The emotional distress has been particularly severe for Groven because the harassment brought up bad memories and adversely affected her enjoyment of her relationship with her boyfriend. *FOF Nos. 45, 47*. At the time of the hearing, the hearing officer found that Groven still contended with repercussions of the sexual harassment, in terms of both the damage to her reputation in the community and the deterioration of her emotional well-being. *FOF No. 44-48, Opinion p. 22*.

Remedies provided by the Montana's Human Rights Act seek to return an employee who is a victim of discrimination to the position that she would have occupied absent the discrimination. *Vortex Fishing Systems v. Foss*, 2001 MT 312, ¶ 27, 208 Mont 8, ¶ 27, 38 P.3d 836, ¶ 27. The severity of the harm governs the amount of recovery. *Vortex*, ¶33.

Based upon the extensive findings regarding the emotional distress experienced by Groven, the Commission finds that the hearing officer misapprehended the significance of the findings when determining an appropriate compensation due to Groven for the unremitting, unaddressed discrimination at Havre Eagles Club. The collusion of the Board of Trustees of the Havre Eagles Club with the perpetrator of the sexual harassment and sexual assault exacerbated the distress and hopelessness that Groven experienced. Accordingly, the Commission finds the portion of Finding of Fact No. 48, which established the dollar amount of the emotional distress damage award, is clearly erroneous. The Commission concludes the record designating the severity of the abuse, the intensity of Groven's suffering, and length of time that the sexual harassment persisted supports a higher damage award.

By a unanimous vote, the Commission remands this matter to the Hearings Bureau for further consideration of the compensatory award for emotional distress damages.

IT IS HEREBY ORDERED, that the appeal of Havre Eagles Club, No. 166, is denied.

IT IS FURTHER ORDERED, that the decision of the hearing officer is affirmed in its entirety, with the single exception of the dollar amount for the emotional distress damage award established in Finding of Fact No. 48. By this Order, the Commission adopts and incorporates the affirmed findings and conclusions of the hearing officer's decision.

The Commission remands this matter to the Hearings Bureau for reconsideration of the emotional distress award for the purpose of making Groven "whole." The hearing officer shall have the discretion to conduct any additional fact-finding regarding the harm experienced by Groven in order to clarify the affirmed and adopted findings.

DATED this 4TH day of August 2011.

L.M. Minich, Chair
Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER was mailed to the following by U.S. Mail, postage prepaid, on this 4TH day of August 2011.

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